Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY, AFL-CIO; and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

Petitioners,

v.

JANET RENO, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 43 U.S.C. § 1331 *et seq.*, extends "[t]he . . . laws . . . of the United States" to the outer Continental Shelf "to the same extent as if the outer Continental Shelf were an area of exclusive federal jurisdiction located within a state." Among the "laws . . . of the United States" is the Immigration and Nationality Act ("INA"). The question presented here is:

Whether a 1978 amendment to the OCSLA, 43 U.S.C. § 1356, which provides only for restrictions on the employment of foreign workers on the outer Continental Shelf and for exceptions to those restrictions, *sub silentio* eliminated entirely the application of the INA to the OCS, thereby removing the prohibitions on entry otherwise applicable to all nonimmigrant aliens seeking to enter the United States.

LIST OF PARTIES

Petitioners are the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Petitioners were plaintiffs in the District Court.

Respondents are Janet Reno, Attorney General; the Immigration and Naturalization Service; Warren J. Christopher, Secretary of State; Frederico Peña, Secretary of Transportation; and the United States Coast Guard. Respondents (or their predecessors in office) were defendants in the District Court.

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PETITION FOR WRIT OF CERTIORARI

The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, AFL-CIO and the United Brotherhood of Carpenters and Joiners of America, AFL-CIO hereby petition this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *United Association of Journeymen & Apprentices, etc. v. Janet Reno, et al.*, 73 F.3d 1134 (D.C. Cir. 1996).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 73 F.3d 1134 and is reprinted in the appendix to this certiorari

petition ("Pet. App.") at p. 1a. The opinion of the United States District Court for the District of Columbia, granting the federal defendants' Motion for Summary Judgment, is unreported and is reprinted at Pet. App. 24a. An earlier opinion in this case by the District of Columbia Circuit, vacating the District Court's grant of summary judgment to the Unions and remanding the case to the District Court for further proceedings, is reported at 981 F.2d 1269 and is reprinted at Pet. App. 38a. The District Court's initial opinion granting the Unions' Motion for Summary Judgment is reported at 768 F.Supp. 375 and is reprinted at Pet. App. 50a.

JURISDICTION

The District of Columbia Circuit issued its decision and judgment on January 16, 1996. This Court has jurisdiction under 28 U.S.C. § 1251(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth at Pet. App. 65a-81a.

STATEMENT OF THE CASE

A. Legal Background

The Court of Appeals held in this case that, although the Outer Continental Shelf Lands Act ("OCSLA") expressly extends the jurisdiction and laws of the United States to the outer Continental Shelf ("OCS"), United States immigration laws do not apply at all to the OCS. The effect of the Court of Appeals' holding is to exempt nonimmigrant aliens seeking to enter the OCS from the entry restrictions provided by the immigration laws, including those that bar aliens who are known criminals, terrorists, saboteurs, spies, and drug abusers from entering the country. Because the Court of Appeals' decision turned on the interplay between the OCSLA and the

immigration laws, we begin by summarizing the relevant provisions of those statutes.

1. The "outer Continental Shelf" consists of the "submerged lands lying seaward and outside" the three-mile area extending from the United States coastline "of which the subsoil and seabed appertain to the United States." 43 U.S.C. § 1331(a); *see* 43 U.S.C. § 1301(a)(2). The Outer Continental Shelf Lands Act (OCSLA) extends the jurisdiction of the United States to these lands, treating them for purposes of federal law as if they were federal lands, such as national parks or federal military bases, within a State:

> *The Constitution and laws and civil and political jurisdiction of the United States* are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources *to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.* . . . [43 U.S.C. § 1333(a)(1) (emphasis supplied).][1]

2. Among the "laws . . . of the United States" is the Immigration and Nationality Act (INA), which comprehensively regulates the entry of aliens into the United States. Under the INA nonimmigrant aliens seeking entry on a temporary basis must obtain visas, and visas are available only if statutory criteria are met. For exam-

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[1] As originally adopted in 1953, § 1333(a)(1) extended federal law to "all artificial islands and fixed structures" on the OCS. Ch. 345, § 4, 67 Stat. 462. The 1978 OCSLA Amendments modified this phrase to provide for the extension of federal law to "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed." Pub. L. No. 95-372, § 208, 92 Stat. 635.

ple, known or potential terrorists, saboteurs and spies, persons convicted of serious crimes, drug abusers, and persons carrying certain communicable diseases or suffering from dangerous mental illnesses are not eligible for visas. *See* 8 U.S.C. § 1182(a)(1), (2) & (3).

The INA provides additional visa criteria for nonimmigrant aliens seeking to enter the United States to work. On the one hand, "an alien . . . who is coming temporarily to the United States to perform . . . temporary service or labor" may generally receive a visa (known as an "H-2B" visa) only "if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. § 1101(a)(15)(H)(ii)(b). Visas also may be granted, however, to certain specified categories of alien employees notwithstanding the availability of U.S. workers. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (nonimmigrants engaged in certain "specialty occupations"); § 1101(a)(15)(L) (nonimmigrants seeking entry to continue work for the same employer "in a capacity that is managerial, executive, or involves specialized knowledge").

3. The 1978 OCSLA Amendments (Pub. L. 95-372, 92 Stat. 635) provide for additional restrictions on foreign worker employment on the outer Continental Shelf, to be set forth in Coast Guard regulations governing the "manning or crewing" of a "vessel, rig, platform or other vehicle or structure." Those restrictions are set forth in 43 U.S.C. § 1356(a)(3), which provides that:

> the Secretary of the Department in which the Coast Guard is operating *shall issue regulations* which require that any vessel, rig, platform or other vehicle or structure . . . which is used . . . for activities pursuant to this subchapter, be manned or crewed, except as provided in subsection (c) of this section, by citizens of the United States or aliens lawfully admitted to the United States for permanent residence. [43 U.S.C. § 1356(a)(3) (emphasis supplied).]

The 1978 Amendments also provide, in 43 U.S.C. § 1356(c), for exceptions to these strict "manning or crewing" requirements, stating in pertinent part that:

> [t]he *regulations* issued under subsection (a)(3) of this section *shall not apply*—
>
> (1) to any vessel, rig, platform, or other vehicle or structure if—
>
> (A) specific contractual provisions or national registry manning requirements in effect on September 18, 1978, provide to the contrary.
>
> (B) there are not a sufficient number of citizens of the United States, or aliens lawfully admitted to the United States for permanent residence, qualified and available for such work; or
>
> (C) the President makes a specific finding . . . that application would not be consistent with the national interest; and
>
> (2) to any vessel, rig, platform, or other vehicle or structure, over 50 percent of which is owned by citizens of a foreign nation or with respect to which the citizens of a foreign nation have the right effectively to control, except to the extent and to the degree that the President determines that the government of such foreign nation . . . has implemented . . . a national manning requirement for equipment engaged in the exploration, development, or production of oil and gas in its offshore areas. [43 U.S.C. § 1356(c) (emphasis supplied).]

In response to the 1978 OCSLA Amendments, the Secretary of the Department of Transportation (the Department within which the Coast Guard is located) has adopted "manning or crewing" regulations, 33 C.F.R. Part 141. *See* Pet. App. 69a.

B. Proceedings Below

1. The Unions brought this suit in the District Court to challenge a government policy under which non-

immigrant alien workers are being permitted to work on the OCS without complying with INA visa requirements. The defendant agencies' position is that the immigration laws simply do not apply to the outer Continental Shelf, because OCSLA § 1356, added by the 1978 OCSLA Amendments, is "intended to be a self-contained statement of the extent to which principles of immigration control are to be applied." Pet.App. 9a, quoting Dept. of Justice, Office of Legal Counsel, Memorandum Opinion No. 79-68, 3 Op. Off. Legal Counsel 362, 369 (1979); *see also* Answers and Objections to Plaintiffs' First Set of Interrogatories to Defendants Janet Reno and Immigration and Naturalization Service, at p. 6 ("Non-immigrants who proceed directly to the OCS, without passing through the United States, do not require inspection, are not required to be admitted to the United States, and therefore require no visa.").

In its initial decision, the District Court granted the Unions' Motion for Summary Judgment and declared the challenged policy illegal. Pet. App. 62a. The District Court held, first, that by enacting the OCSLA, Congress did extend the provisions of the INA to the OCS and, second, that in adopting the 1978 OCSLA Amendments, Congress "did not effect a general repeal of application of the INA to the OCS." Pet. App. 62a. The District Court also held that it was not necessary to determine the question whether § 1356, where applicable, supersedes INA visa requirements. The work at issue, the District Court ruled, was not covered by § 1356 because the temporary construction workers did not "man or crew" oil platforms. Pet. App. 61a; *see* 43 U.S.C. § 1356(a)(3). The District Court observed, however, that

> [b]y its very terms, § 1356(c) sets forth exceptions to "[*t*]*he regulations issued under subsection (a)(3) of this section* . . ." 43 U.S.C. § 1356(c) (emphasis added). Nowhere does § 1356(c) purport to create

> exceptions to application of the INA . . . . [Pet. App. 57a (emphasis supplied by District Court).] [2]

On the federal defendants' appeal, the Court of Appeals did not decide the legal questions addressed by the District Court. Instead, the Court of Appeals stated that the questions should not be decided without a more complete factual record regarding the kind of work performed by construction workers installing offshore oil platforms, vacated the judgment and remanded the case for development of an appropriate factual record. Pet. App. 48a-49a. On remand and after further discovery, the District Court determined that § 1356 *is* applicable to the work at issue. Then, in a complete about face from its earlier legal analysis regarding the plain language of the statute, the District Court held that because § 1356—more precisely the foreign ownership exception to that provision—applies to the construction workers, the INA does not apply at all. Pet. App. 37a. The District Court granted summary judgment to the federal defendants. *Id.*

2. The case returned to the D.C. Circuit on the Unions' appeal. The Unions did not contest that the "manning or crewing" regulations apply to the work. Pet. App. 5a. Rather, the Unions argued that § 1356 is irrelevant to whether employees on the OCS are required to obtain H-2 visas, because by its terms § 1356 does not disturb in any way the statutory extension of federal law to the OCS for *all* purposes, 43 U.S.C.

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[2] The District Court acknowledged that an earlier decision involving offshore platform workers based on a crane ship, *Piledrivers Local Union No. 2375 v. Smith*, 695 F.2d 390, 393-94 (9th Cir. 1982), had treated the exceptions to the "manning or crewing" regulations as if they were exceptions to the INA. Pet. App. 57a. In that case, however, the plaintiff had not contested this issue. 695 F.2d at 893. The *Piledrivers* decision offered no reasoning on the point (*see id.* at 394), and, as the District Court stated, "ignore[s] the plain language of § 1356(c)." Pet. App. 57a. The District Court therefore found the *Piledrivers* decision to be unhelpful. Pet. App. 57a.

§ 1333(a)(1); the employment restrictions imposed by § 1356 for certain work on the OCS are therefore necessarily *additional* to those imposed by *any* other federal law, including the INA. 43 U.S.C. § 1356(a)(3). And, by their terms, the regulatory *exceptions* provided by § 1356(c) are just that—exceptions to the § 1356 regulations—not to any other provisions. *See* 43 U.S.C. § 1356(c) (providing that the "*regulations* issued under" § 1356(a)(3) "shall not apply" in specified circumstances.) Thus, the Unions explained, § 1356 does not speak to the pertinent issue, which is whether *the INA* applies to the outer Continental Shelf. Pet. App. 8a.

The Court of Appeals affirmed the District Court's ruling. Judge Randolph, writing for himself and Judge Wald, began by acknowledging that if the Court "looked only to § 1333(a)(1) [the provision extending federal law to the OCS], the union's case would be a strong one." Pet. App. 8a. The majority also acknowledged that the Unions' reading of § 1356 as providing only for regulations imposing additional restrictions and exceptions to those regulations "is plausible." Pet. App. 9a. The majority, however, rejected that reading, stating that "applying the Immigration and Nationality Act despite § 1356 would be treating that provision, and the exceptions written in it, as nonsensical." Pet. App. 10a.

Chief Judge Edwards, in dissent, admonished the majority for acting "[i]n defiance of the plain terms of the statute" (Pet. App. 14a), because "the plain language of section 1356(c) indicates that its exceptions were intended only as exemptions to the strict manning and crewing regulations . . . and *not* to the general application of the INA." Pet. App. 17a.

Judge Edwards also emphasized two critical points to which the majority made no response. First, Judge Edwards demonstrated in some detail that applying both the INA and the § 1356 "manning or crewing" requirement would *not* leave either provision without substantial sig-

nificance. For example, the § 1356 regulations apply to free-floating vessels, while the INA is made applicable only to "installations and other devices permanently or temporarily attached to the seabed" of the OCS. 43 U.S.C. § 1333(a)(1). Pet. App. 18a. Further, under the INA, several categories of visas are available to alien employees notwithstanding the availability of U.S. workers. The § 1356 "manning or crewing" requirements foreclose those visa categories to alien workers on the OCS, and the § 1356(c) exceptions restore those visa categories in limited circumstances. Pet. App. 19a-20a.

Second, Judge Edwards pointed out that the majority's decision leaves workers on the OCS "subject to *no immigration restrictions at all*" (Pet. App. 20a (emphasis in original)), including restrictions preventing aliens who have "communicable diseases, who have been convicted of a crime, or who have engaged in terrorist activity" from entering the United States. *Id.* Judge Edwards observed that "[s]urely it cannot be that Congress meant to foreclose the Immigration and Naturalization Service from regulating the presence of known terrorists who are working in United States territory." Pet. App. 20a-21a.

REASONS FOR GRANTING THE WRIT

This Court has many times considered cases concerning the proper construction of the Outer Continental Shelf Lands Act (OCSLA), *e.g., Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Secretary of the Interior v. California*, 464 U.S. 312 (1984); *Watt v. Energy Action Educ. Foundation*, 454 U.S. 151 (1981); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Maryland v. Louisiana*, 451 U.S. 725 (1981), and of the Immigration and Nationality Act (INA), *e.g., Stone v. Immigration and Naturalization Service*, 115 S.Ct. 1537 (1995); *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549 (1993); *Reno v. Catholic Social Services*,

Inc., 509 U.S. 43 (1993); *Reno v. Flores*, 507 U.S. 292 (1993); *INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *INS v. Doherty*, 502 U.S. 314 (1992). The Court has not yet, however, had occasion to address the interplay between these two statutes. This case provides the opportunity to do so, in a context in which the fundamental question concerning the interaction of the two statutes—whether the INA has any application at all to the outer Continental Shelf ("OCS")—is squarely raised.

The Court of Appeals' decision answers that basic question in the negative. This conclusion would allow aliens who are *not* permitted to enter the United States to visit and work on the "miraculous structures which [have risen] from the sea bed of the outer Continental Shelf." Warren M. Christopher, *The Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23, 37 (1953) ("*New Frontier*").[3]

The INA, for example, bars nonimmigrant aliens who are known or suspected terrorists, saboteurs, spies, convicted criminals, and drug abusers, as well as persons who pose a threat to others because of serious communicable disease or mental disorder, from entering the United States. 8 U.S.C. § 1182(a)(1), (2) & (3). Under the decision below, however, those very individuals would be

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[3] While the presence of many veritable small cities scattered across the OCS was only a prediction in 1953 when now-Secretary of State Christopher wrote his seminal article concerning the OCSLA, that prediction has been amply fulfilled: There are now more than 3800 platforms on the OCS. About 400 million barrels of crude oil and 5 trillion cubic feet of natural gas are drawn each year from the seabed. United States Dept. of the Interior, Minerals Management Service, Operations and Safety Management, *Offshore Stats* Second Quarter 1995, at pp. 2-3. The Minerals Management Service plans to sell additional OCS leases in the Gulf of Mexico and offshore Alaska during the period 1997-2002. United States Dept. of the Interior, Minerals Management Service, *Outer Continental Shelf Oil & Gas Leasing Program: 1997-2002, Draft Environmental Impact Statement, February 1996*, Vol. I, at p. i.

able to enter the oil platforms and other structures on the OCS.

The OCS houses some of the nation's most environmentally sensitive facilities. A single blowout or other oil platform disaster could devastate our coasts and our economy to a degree equalling or exceeding the environmental and human impact of an oil spill such as the Exxon Valdez spill off Alaska. *See, e.g.*, Dwight Holing, Coastal Alert: Ecosystems, Energy and Offshore Oil Drilling 17-18 (1990) (describing blowout of an oil drilling platform off Santa Barbara that spilled 50,000-70,000 barrels of oil over 660 square miles, fouling 150 miles of the California coast); Ixtoc I: A Case Study of the World's Largest Oil Spill, 10 Ambio No. 6, 299-306 (1981).

Those facilities are also a highly visible source of political controversy. *See, e.g.*, "Greenpeace Activists Seize Doomed Rig," Washington Times, May 1, 1995, at p. A12. The notion that Congress intended to permit free access to those OCS facilities by foreign nationals too dangerous to be allowed within the borders of California, Florida or Texas seems at odds with common sense. This is particularly so because Congress expressly declared its intent in the OCSLA to "minimize the likelihood of blowouts, loss of well control, fires, spillages . . . or other occurrences which may cause damage to the environment or to property, or endanger life or health." 43 U.S.C. § 1332(6).

The methodology of statutory construction used by the Court of Appeals majority is no more defensible than its result. By adopting the OCSLA in 1953, Congress emphatically asserted U.S. "civil and political jurisdiction" over the seabed of the outer Continental Shelf—an area almost one-tenth the size of the continental United States and, in terms of mineral resources and food potential, more important than the Louisiana Purchase (*New Frontier*, 6 Stan. L. Rev. at 23)—and over all structures fixed to that seabed. 43 U.S.C. § 1333(a). As Secretary

Christopher recognized at the time, that "assertion [of sovereignty] . . . is the foundation of the entire Act." *New Frontier,* 6 Stan. L. Rev. at 32. The 1953 Congress also was well aware that the structures on the OCS soon would become home to communities of people, and that:

> the "whole circle of legal problems" . . . could arise on the OCS, because the large crews working on the great offshore structures would "die, leave wills, and pay taxes. They will fight, gamble, borrow money, and perhaps even kill. They will bargain over their working conditions and sometimes they will be injured on the job." [*Shell Oil Co. v. Iowa Dept. of Revenue, supra,* 488 U.S. at 27 n.8, quoting *New Frontier,* 6 Stan. L. Rev. at 37.][4]

For this reason, the OCSLA provides expressly that federal law extends to the OCS to the same extent "as if" it were "an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. § 1333(a)(1).

By 1978, the envisioned small cities had become reality, with thousands of workers on the OCS. In the midst of the "energy crisis," encouraging oil and gas production on the OCS was of great national importance. At the same time, because of recent oil spills and the rise of the environmental movement, there also was heightened concern over dangers to the environment.[5] Thus, the 1978

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[4] See also Vol. 99, Cong. Record, 83d Cong. 1st Sess. 6962 (June 22, 1958) (Statement of Sen. Clay Cordon, Acting Chairman of Senate Interior Committee, upon introduction of the bill) ("the full development of . . . the shelf area will require the physical presence of thousands of workers on fixed structures in the shelf area. Industrial accidents, accidental death, peace, and order—these and many other problems and situations need and must have legislative attention").

[5] *See, e.g.,* Vol. 124, Cong. Record, 95th Cong. 2d Sess. 26779 (August 17, 1978) (Statement of Rep. John Murphy, Chairman of the House Select Committee on the Outer Continental Shelf) ("Recent events have detailed the need for this bill: offshore oil spills, here, off France, and in the North Sea [and] reports of shut-in wells. . . ." The 1978 OCSLA Amendments "can make a

Amendments were substantially devoted to providing a means of assuring protection against those environmental dangers.

It would seem unlikely, therefore, that the 1978 Congress would have *sub silentio* repealed entirely the application of United States immigration laws to the OCS, thereby eliminating all governmental screening of foreign nationals entering the environmentally sensitive facilities on the OCS.[6] Yet that was the D.C. Circuit's holding.

This Court should grant certiorari to determine whether the Court of Appeals was right in concluding that, despite the actual language of the statutes adopted by Congress, Congress' clear decision to extend to the OCS and the structures erected thereon the full jurisdiction of the United States, and the national security risks involved, Congress intended to make the OCS an immigration law "no-man's land" where there are no restrictions on entry.

1. The starting point for any exercise in statutory construction is, of course, the language of the statute. The Court of Appeals majority admitted, based on the plain language of § 1333(a)(1), that the argument that the INA applies to the outer Continental Shelf is "a strong one." Pet. App. 8a. Not only does the OCSLA declare,

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profound contribution to the Nation's energy crisis and do so in a manner that takes into account . . . the protection of our marine and coastal environment.")

[6] "The visa process is our first line of defense" against international terrorism. The federal government "lookout" system contains more than 3,500,000 names, including known aliases, of persons probably not eligible for visas on one or more grounds. Terrorism and America: A Comprehensive Review of the Threat, Policy, and Law, Hearing before the Senate Judiciary Committee, S. Hrg. No. 581, 103rd Cong., 1st Sess. 153-56 (1993) (Statement of James L. Ward on behalf of the U.S. Dept. Of State); *see also* Terrorism, Asylum Issues, and U.S. Immigration Policy, Hearing before the Subcommittee of Immigration and Refugee Affairs of the Senate Judiciary Committee, S. Hrg. No. 595, 103rd Cong., 1st Sess. 15-16 (1993).

as its fundamental premise, that the seabed of the OCS and the attached structures are part of the United States, but the OCSLA also states broadly that, with a sole exception (*see* p. 22, *infra*), the "laws . . . of the United States" are applicable to the OCS "as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." 67 Stat. 462, § 4 (*codified at* 43 U.S.C. § 1333(a)(1)). *Nothing* in the OCSLA or its legislative history suggests the 1953 Congress did *not* consider the INA one of the "laws of the United States." Indeed, in adopting the OCSLA, the Senate Interior Committee deleted from the bill language specifically applying the INA to oil development activities on the OCS, explaining that, "since all applicable Federal laws are extended to the seabed and subsoil of the outer shelf [by § 1333(a)(1)], the specific provisions respecting aliens are believed unnecessary." S. Rep. No. 411, 83d Cong., 1st Sess. 24 (1953). *See* S. 1901, § 4(g), *reprinted in Outer Continental Shelf: Hearings before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 1st Sess. (1953); *see also New Frontier*, 6 Stan. L. Rev. at 37-43.

The Court of Appeals also acknowledged that § 1356 of the 1978 OCSLA Amendments "*may* be read as the unions read it" (Pet. App. 9a (emphasis supplied)), *i.e.* as providing simply for regulations imposing *additional* restrictions on OCS employment and for exceptions to those additional regulations, rather than as providing that the INA will not apply to the OCS. In fact, not only "may" § 1356 be read this way but, as Judge Edwards stated, any other reading "makes a mockery of . . . the plain language of the statute." Pet. App. 23a.

Section 1356 directs, in subsection (a)(3), that regulations be promulgated imposing certain "manning or crewing" requirements applicable to the OCS. It then provides, in subsection (c)—entitled "[e]xceptions from manning requirements"—that, in specified situations,

"[t]he *regulations* issued under subsection (a)(3) . . . shall not apply." 43 U.S.C. § 1356(c) (emphasis added).

The Court of Appeals nonetheless attempted to manufacture ambiguity from this straightforward provision, stating that "[t]o say that no vessel or structure may have a crew of noncitizens or nonresident aliens unless it is foreign-owned, is to say—or, at least, to suggest rather strongly—that foreign-owned vessels and structures may have such crews." Pet.App. 9a. But § 1356 does *not* say that any vessels "may" have crews of noncitizens or nonresidents or that vessels may not have such crews unless they are foreign owned. Section 1356, *in terms*, provides for regulations imposing manning or crewing restrictions on certain vessels and structures, for exceptions to *those additional requirements*, and for absolutely nothing more. The Court of Appeals' suggestion that the statutory language is ambiguous is not rooted in that statutory language, making a response neither necessary nor possible. "It is difficult to argue with the proposition that a statute can be rephrased to say something different." *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 n.2 (1988).

2. Despite the presumption that Congress "says in a statute what it means and means in a statute what it says there" (*Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992)), the Court of Appeals rejected a construction faithful to the statutory language, stating that "applying the Immigration and Nationality Act despite § 1356 would be treating that provision, and the exceptions written in it, as nonsensical" because "[t]he exemption granted in § 1356(c)(1)(A) would then . . . be rendered essentially worthless." Pet. App. 10a. But the majority was quite wrong in its implication that the statute, if read as Congress wrote it, would be either a folly or a nullity. In fact, if *both* § 1333(a)(1) and § 1356 are given full effect, there would be *five different* practical results that would not obtain if only one of the two sections had been enacted:

First, § 1356 does not solely provide for manning or crewing regulations, the subject of § 1356(a)(3). The provision also contains a direction that documentary (§ 1356(a)(1)) and design and construction (§ 1356 (a)(2)) regulations be promulgated, which have no parallel in the INA, and provides that any "vessel, rig, platform, or other vehicle or structure" must adhere to *all three* types of regulations. § 1356(a). That one or more of the kinds of structures listed as covered generically by all three kinds of regulations will be more drastically affected by some of the regulations than by others —for example, that the design requirements will have a greater impact upon fixed platforms than will the manning and crewing requirements—does not indicate that Congress' compact drafting leads to empty results.

Second, as Judge Edwards also pointed out, as to "manning or crewing" requirements, § 1356 applies to free-floating vessels used for purposes of developing the resources of the OCS, while the INA is not made applicable by § 1333(a)(1) to any such ships or vessels. *See* Pet. App. 18a. The establishment of rules for crews of ships temporarily present near OCS installations for purposes of buying supplies or transporting people was an important concern of the 1978 Congress. Pet. App. 18a-19a. Section 1356 imposes such rules and provides a fully effective exception to them for foreign-owned ships. Thus, a reading of the statute which, unlike the Court of Appeals' interpretation, does no violence to the statutory language would have the substantial result that the covered vessels would be subject to *some* limitations concerning whether foreigners may work on them, rather than none at all.[7]

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[7] We note that for this reason, among others, this is not a situation in which there is any legislative history at odds with the statute's plain meaning. In particular, nothing in the 1978 legislative history indicates an intent to affect in any way the application of the INA to the OCS. While the majority below noted that the legislative history does indicate a concern with eliminating the

Third, as Judge Edwards also pointed out, visas requiring certification of U.S. worker unavailability are *not* the only visas issued to nonimmigrant aliens entering the United States to perform work. Many individuals can come to work temporarily in the United States without regard to whether citizen or resident alien employees are available to perform that work. Pet. App. 19a-20a. The § 1356(a)(3) "manning or crewing" requirements generally foreclose the use of these other visas on OCS structures including oil platforms and derrick barges, while the § 1356(c) exceptions restore the availability of these visas under limited circumstances. *Id.* Thus, § 1356(a)(3) and § 1356(c) have independent vitality in applying to " 'any . . . rig, platform, or other . . . structure,' not just to vessels,' " as the majority incorrectly states. Pet. App. 12a.

Fourth, the "manning or crewing" requirements, as interpreted by their implementing regulations, do not apply to all employees on the OCS, only to employees who are part of the "regular complement" of a unit. 33 C.F.R. § 141.13 (a), (b). For employees who are not part of the "regular complement," the § 1356(a)(3) manning and crewing requirements do not apply, and

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likelihood of retaliation against American workers in foreign offshore oil activities (Pet. App. 11a), there is no reason to believe Congress was concerned with retaliation due to enforcement of the *same* INA entry rules applicable to other areas under United States jurisdiction, rather than with retaliation due to the application of the *additional* requirements added by § 1356. *That* is the concern dealt with by the plain statutory language, and "it is not a function of this Court to presume that Congress was unaware of what it accomplished." *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

Moreover, as Judge Edwards pointed out, the majority's interpretation would turn § 1356 "on its head" (Pet. App. 14a), because Congress clearly intended the provision to offer "*additional* protection for American workers on the OCS" (*id.* (emphasis supplied)), and "the legislative history of the 1978 Amendments suggests that section 1356 was actually designed to close certain regulatory gaps that existed *despite* application of the INA to the OCS." Pet. App. 17a (emphasis in original).

the INA labor certification requirements are not duplicative in the least.

Fifth, and perhaps most importantly, as Judge Edwards again made clear, the INA contains several provisions limiting entry of certain individuals for *any* purpose into the United States, most notably those barring entry of known or suspected terrorists, saboteurs, drug abusers, and so on. Pet. App. 20a; *see* 8 U.S.C. § 1182(a)(1), (2) & (3). Since those provisions have no counterpart in § 1356, only applying *both* § 1333(a)(1) and § 1356 as Congress wrote them would serve to apply those limitations to the oil platforms, derrick barges, and other extremely sensitive areas on the OCS.

Thus, there is *not a single subsection, sentence, phrase or word in either the INA or § 1356 that is rendered ineffective or superfluous by the application of the other statute.* To the contrary, the *most* that can be said on this point is that there are some circumstances in which § 1356 and the INA overlap, providing nearly identical and not inconsistent requirements that a U.S. worker be unavailable before a nonimmigrant alien worker can be hired.

This Court's prior holdings have applied a far higher standard in determining that two statutes are mutually repugnant such that they cannot coexist. *See Connecticut Nat. Bank v. Germain, supra,* 508 U.S. at 253 ("Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." (citation omitted)); *Town of Red Rock v. Henry*, 106 U.S. 596, 601 (1883) ("it is not sufficient to establish that subsequent laws cover some or even all the cases provided for . . . for they may be merely affirmative or cumulative or auxiliary"); *Morton v. Mancari,* 417 U.S. 535, 551 (1974) ("[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the

court, absent a clearly expressed legislative intent to the contrary, to regard each as effective"). The Court of Appeals necessarily applied a quite different standard from that used by this Court for what constitutes a "nonsensical" interaction between two apparently applicable statutes. *Compare, e.g., Concrete Pipe & Prod. v. Construction Laborers Pension Trust,* 508 U.S. 602 (1993) (departing from statutory language only after finding that language "incoherent"). Thus, this case provides this Court with the opportunity not only to reverse a patently incorrect statutory interpretation with potentially dangerous environmental and socioeconomic consequences, but also to clarify the application of the "mutual repugance" rule.[8]

3. Aside from its key and erroneous premise that a straightforward application of the two statutory provisions would be "nonsensical", the majority opinion also rests on the assertion that its interpretation follows that of the Justice Department, and the Justice Department's interpretation is entitled to deference. Pet. App. 9a, citing *NationsBank of North Carolina, N.A. v. Variable*

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[8] It should at least have given the majority pause that the Select Committee overseeing implementation of the 1978 OCSLA Amendments, whose chairperson also was chairperson of the House Committee and the House-Senate Conference Committee responsible for those very amendments, stated emphatically that the supposedly "nonsensical" plain meaning interpretation of § 1356 was in fact precisely the interpretation Congress intended. *See* Pet. App. 21a-22a, citing H.R. Rep. No. 1214, 96th Cong. 2d Sess. iii, 68, 98 (1980). We are not suggesting that post-enactment legislative history is generally a good guide to what a prior Congress intended (*but see Cannon v. University of Chicago,* 441 U.S. 677, 687 n.7 (1979)); there is no need for such an argument because the statutory language is clear. Where, however, the members of Congress most responsible for the statute quite clearly state that Congress intended precisely the meaning said by a court to be "nonsense," it is unlikely the court really means that members of Congress lack sense, rather than that the judges, had they been legislators, would not have voted for the bill.

Annuity Life Ins. Co., 115 S. Ct. 810, 813 (1995) and *National Ass'n of Regulatory Util. Comm'rs v. SEC*, 63 F.3d 1123, 1126 (D.C. Cir. 1995). But, unlike the majority opinion, the cases relied upon recognize that, under this Court's precedents, court scrutiny of agency interpretation is a *two*-step process.

A court must "inquire *first* whether the 'intent of Congress is clear' " from the language of the statute and, "[i]f so, 'that is the end of the matter.' " *NationsBank, supra*, 115 S. Ct. at 813 (emphasis supplied), quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); only " 'if the statute is silent or ambiguous with respect to the specific issue' " does the court move to step two, in which the court examines whether the agency interpretation is a reasonable one. *NationsBank, supra,* 115 S.Ct. at 813, quoting *Chevron, supra,* 467 U.S. at 843. The Court of Appeals should never have reached the second step of the analysis in this case, because the statute is clear. Nor as the majority apparently believed, is there any statute of limitations by which an agency interpretation becomes uncontestable once it has persisted for a sufficient time. *See Demarest v. Manspeaker*, 498 U.S. 184 (1991) (100-year-old administrative construction of statute rejected as contrary to the language of the statute).

4. Finally, the majority refused to acknowledge the venerable rule, followed by this court in decisions from *Town of Red Rock v. Henry,* 106 U.S. 596, 601 (1883) to *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982), that repeals by implication are not favored and will not be found except in cases of *true* repugnancy. The reason for the presumption against implicit repeals, as then-Judge Scalia explained in an opinion for the D.C. Circuit,

> is not that Congress is unlikely to change the law . . . but rather, that Congress "legislate[s] with knowledge of former related statutes," *Continental*

> *Insurance Co. v. Simpson*, 8 F.2d 439, 442 (4th Cir. 1925), and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction. . . .
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> It will not do to give this principle of statutory interpretation mere lip service and vacillating practical application. A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. . . . Without it, determining the effect of a bill upon preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamemanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose. [*United States v. Hansen*, 772 F.2d 940, 944-45 (D.C. Cir. 1985) (Scalia, J.).]

The expectation that Congress will not repeal statutes by implication is especially strong in a case such as this, where the repeal would involve the provision providing the central premise of the entire statute—that the OCS and structures permanently or temporarily attached to it are for legal purposes a part of the United States. *See* 43 U.S.C. § 1333(a)(1); *see also New Frontier*, 6 Stan. L. Rev. at 32; Vol. 99, Cong. Record, 83d Cong., 1st Sess. 6963 (Statement of Sen. Cordon, describing section as "the heart" of the OCSLA). Morever, the majority's suggestion that the rule against repeals by implication is not applicable because § 1356 was placed in the same act as § 1333, albeit 25 years later, does not find support in prior decisions. *See, e.g., Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936) (applying "cardinal rule" against repeals by implication to reject contention that amendment to provision of the Federal

Reserve Act implicitly repealed earlier-enacted provision in same act); *United States v. Joya-Martinez,* 947 F.2d 1141, 1144 (4th Cir. 1991) (applying presumption against implied repeals to reject argument that amendment to INA "amended or repealed by implication" other provision of INA). Indeed, where the allegedly "repealed" provision is part of the same act, Congress is less likely to have overlooked it.[9]

Finally, it is noteworthy that the OCSLA does in terms state one, and only one, limitation upon the supervening principle that all federal laws apply to the covered devices on the OCS: Section 1333(a)(1) ends with the proviso that "mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter." The D.C. Circuit opinion would in effect add a second proviso—"that the immigration restrictions shall only be those under the provisions of this subchapter." But the second proviso, unlike the first, does not appear anywhere in the statute. For the courts to create such an implied limitation is to assume that Congress' failure to enunciate that second limitation was the result of inadvertence rather than choice. That assumption, dubious in any event for the reasons stated in *Hansen, supra,* cannot be entertained where, as here,

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[9] Nor is it any justification for the misapplication of the implied repeal prohibition that there also were amendments to § 1333(a)(1) in 1978, broadening the kinds of devices to which United States "civil and political" jurisdiction are extended. The fact remains that *some* devices attached to the seabed were clearly covered by the extension of jurisdiction in 1953—"artificial islands and fixed structures." 43 U.S.C. § 1333(a)(1). *See Rodriguez v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 355 (1969); *Pure Oil Co. v. Snipes,* 293 F.2d 60, 62 (5th Cir. 1961). As to these areas that were covered in 1953 at least, the issue of the impact of the 1978 amendments is certainly one of implied repeal. And there is no principal basis on which to separate devices added to the United States' legal jurisdiction in 1978 from those covered previously for purposes of determining the impact of § 1356, nor does the Court of Appeals' decision purport to do so.

there is direct evidence that Congress took care to specify those federal statutes it intended to supervene.

* * * *

In short, the conclusion the Court of Appeals reached with regard to the interaction between the INA and the OCSLA was that Congress intended that the INA, *alone of all federal statutes* (other than the mineral leasing statutes explicitly displaced), have no application whatever on the sensitive oil platforms and other devices on the OCS. This conclusion eliminates central INA protections designed by Congress to control entry into the United States generally, and does so with respect to areas otherwise subject to federal law and occupied by expensive, highly technical, machinery used to extract environmentally hazardous natural resources. In reaching this conclusion, the court below proceeded in a manner that ran afoul of four separate well-developed principles—the plain words doctrine, the mutual repugnance standard, the *Chevron* limitations on administrative interpretation, and the presumption against implied repeal. All these bedrock statutory interpretation principles are designed to assure that both the executive and judicial branches of government respect the preeminent role of the legislature in making fundamental policy decisions, and that Congress can legislate against the background of a set of firm, consistent understandings concerning how its words will be read. Because both the statutory result reached and the methodology used in reaching it raise issues of practical and legal importance, this Court should grant certiorari and reverse the judgment below.

CONCLUSION

For the reasons stated above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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